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FERRERO U.S.A, INC.

8
9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
11

12 In re FERRERO LITIGATION

) CASE NO.: 11 CV 0205 H (CAB)
)

13) FERRERO U.S.A., INC.'S ANSWER
14) TO PLAINTIFFS' FIRST AMENDED
15) CONSOLIDATED COMPLAINT

16) Before: Hon. Marilyn L. Huff
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Defendant Ferrero U.S.A., Inc. (“Ferrero”) hereby answers the allegation in plaintiffs’ Amended Consolidated Complaint (the “Complaint”), filed July 3, 2011. To the extent the paragraphs of the Complaint are grouped under headings and subheadings, Ferrero responds generally that such headings and subheadings (which are not repeated below) state legal conclusions and pejorative inferences as to which no response is required. Except as explicitly admitted herein, each and every allegation of the Complaint is denied. Ferrero further answers the numbered paragraphs of the Complaint as follows:

ANSWER

1. Paragraph 1 of the Complaint purports to characterize plaintiffs’ preliminary statement. Ferrero denies that plaintiffs’ claims have merit, and further denies that plaintiffs are entitled to any form of relief.

2. Ferrero admits that Nutella® is a “hazelnut spread,” and that sugar and palm oil are two of its ingredients. Ferrero admits that Nutella® was invented in Italy in the 1940s by Pietro Ferrero. Ferrero admits that Nutella® has been sold in Europe since that time. Ferrero admits that Nutella® is distributed in other countries, including Australia. Ferrero admits that Nutella® began being sold in the United States in the early 1980s. Ferrero denies the remaining allegations in paragraph 2 of the Complaint.

3. Ferrero denies the allegations in paragraph 3 of the Complaint.

4. Ferrero admits that other entities advertise Nutella in Europe and is informed and believes that they have received correspondence from the Advertising Standards Authority. Ferrero denies the remaining allegations in paragraph 4 of the Complaint.

5. Ferrero lacks knowledge and information regarding the allegations in paragraph 5 of the Complaint, and on that basis denies them.

6. Ferrero lacks knowledge and information regarding the allegations in paragraph 6 of the Complaint, and on that basis denies them.

7. Ferrero denies the allegations in paragraph 7 of the Complaint.

8. Ferrero admits that Nutella® contains saturated fat and sugar in the amounts described on its label, as defined by FDA regulations, and that Nutella® contained partially

1 hydrogenated peanut oil for a portion of the class period. Ferrero denies the remaining
2 allegations in paragraph 8 of the Complaint.

3 9. Ferrero lacks knowledge and information as to the allegations regarding plaintiffs
4 and on that basis denies such allegations. Ferrero denies the remaining allegations in paragraph
5 9 of the Complaint.

6 10. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
7 and on that basis denies the allegations in paragraph 10 of the Complaint.

8 11. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
9 and on that basis denies the allegations in paragraph 11 of the Complaint.

10 12. Ferrero admits that it is a Delaware corporation with its principal place of
11 business in New Jersey.

12 13. Ferrero admits that it is a subsidiary of Ferrero International S.A.. Ferrero admits
13 that it is registered to do and does business within the State of California. Ferrero denies the
14 remaining allegations in paragraph 13 of the Complaint.

15 14. Ferrero admits that it distributes and sells Nutella®. Ferrero admits that Ferrero
16 Canada, Ltd. manufactures Nutella®. Ferrero denies the remaining allegations in paragraph 14 of
17 the Complaint.

18 15. Ferrero does not have information sufficient to confirm the total amount of
19 Nutella® sold in each state and denies the allegations contained in paragraph 15 of the
20 Complaint.

21 16. Ferrero admits that Ferrero Canada, Ltd. manufactures Nutella® in a factory
22 located in or around Brantford, Ontario, Canada. Ferrero lacks knowledge and information
23 regarding the remaining allegations in paragraph 16 of the Complaint, and on that basis denies
24 them.

25 17. Ferrero denies the allegations in paragraph 17 of the Complaint.

26 18. Ferrero denies the allegations in paragraph 18 of the Complaint.

27 19. Ferrero lacks knowledge and information regarding the allegations in paragraph
28 19 of the Complaint, and on that basis denies them.

1 20. Ferrero lacks knowledge and information regarding the allegations in paragraph
2 20 of the Complaint, and on that basis denies them.

3 21. Ferrero admits that the Court has jurisdiction over this action as currently pleaded.
4 Ferrero admits that there are numerous members of the putative class that are citizens of a state
5 other than the state of which Ferrero is a citizen.

6 22. Ferrero admits that the Court has personal jurisdiction over Ferrero for purposes
7 of this action.

8 23. Ferrero admits that venue is proper in this Court for this action and that it is
9 registered to do business in California. Ferrero denies the remaining allegations in paragraph 23
10 of the Complaint.

11 24. Ferrero admits that Nutella® is a “hazelnut spread.” Ferrero admits that it sells
12 Nutella®. Ferrero admits that sugar and palm oil are two of the ingredients of Nutella®. Ferrero
13 denies that it manufactures Nutella®. Ferrero lacks knowledge and information as to the
14 allegations regarding plaintiffs and on that basis denies such allegations. Ferrero denies the
15 remaining allegations in paragraph 24 of the Complaint.

16 25. Ferrero admits that Nutella® contains fat and sugar in the amounts listed on its
17 label, as defined by FDA regulations. Ferrero denies the remaining allegations in paragraph 25
18 of the Complaint.

19 26. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
20 and on that basis denies the allegations in paragraph 26 of the Complaint.

21 27. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
22 and on that basis denies the allegations in paragraph 27 of the Complaint.

23 28. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
24 and on that basis denies the allegations in paragraph 28 of the Complaint.

25 29. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
26 and on that basis denies the allegations in paragraph 29 of the Complaint.

27 30. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
28 and on that basis denies the allegations in paragraph 30 of the Complaint.

1 31. Ferrero lacks knowledge and information as to the allegations regarding plaintiff
2 and on that basis denies the allegations in paragraph 31 of the Complaint.

3 32. Ferrero lacks knowledge and information as to the allegations regarding plaintiffs
4 and on that basis denies the allegations in paragraph 32 of the Complaint.

5 33. Ferrero lacks knowledge and information as to the allegations regarding plaintiffs
6 and on that basis denies the allegations in paragraph 33 of the Complaint.

7 34. Ferrero admits that paragraph 34 of the Complaint purports to characterize
8 plaintiffs' claims and prayer for relief. Ferrero denies that plaintiffs' claims have merit, and
9 further denies that plaintiffs are entitled to any form of relief.

10 35. Ferrero denies that it falsely or misleadingly marketed Nutella®. Ferrero lacks
11 knowledge and information regarding the remaining allegations in paragraph 35 of the
12 Complaint, and on that basis denies them.

13 36. Ferrero admits the allegations in paragraph 36 of the Complaint.

14 37. Ferrero admits the allegations in paragraph 37 of the Complaint.

15 38. Ferrero admits that one serving of Nutella® is 2 tablespoons, which contains 3.5
16 grams of saturated fat, as determined by FDA regulations. Ferrero lacks knowledge and
17 information regarding the remaining allegations in paragraph 38 of the Complaint, and on that
18 basis denies them.

19 39. Ferrero denies the allegations in paragraph 39 of the Complaint.

20 40. Ferrero admits that one serving of Nutella® contains 21 grams of sugar, as
21 defined by FDA regulations. Ferrero denies the remaining allegations in paragraph 40 of the
22 Complaint.

23 41. Ferrero denies the allegations in paragraph 41 of the Complaint.

24 42. Ferrero denies the allegations in paragraph 42 of the Complaint.

25 43. Ferrero denies the allegations in paragraph 43 of the Complaint.

26 44. Ferrero lacks knowledge and information regarding the allegations in paragraph
27 44 of the Complaint, and on that basis denies them.

1 45. Ferrero lacks knowledge and information regarding the allegations in paragraph
2 45 of the Complaint, and on that basis denies them.

3 46. Ferrero denies the allegations in paragraph 46 of the Complaint.

4 47. Ferrero lacks knowledge and information regarding the allegations in paragraph
5 47 of the Complaint, and on that basis denies them.

6 48. Ferrero lacks knowledge and information regarding the allegations in paragraph
7 48 of the Complaint, and on that basis denies them.

8 49. Ferrero lacks knowledge and information regarding the allegations in paragraph
9 49 of the Complaint, and on that basis denies them.

10 50. Ferrero lacks knowledge and information regarding the allegations in paragraph
11 50 of the Complaint, and on that basis denies them.

12 51. Ferrero lacks knowledge and information regarding the allegations in paragraph
13 51 of the Complaint, and on that basis denies them.

14 52. Ferrero lacks knowledge and information regarding the allegations in paragraph
15 52 of the Complaint, and on that basis denies them.

16 53. Ferrero lacks knowledge and information regarding the allegations in paragraph
17 53 of the Complaint, and on that basis denies them.

18 54. Ferrero lacks knowledge and information regarding the allegations in paragraph
19 54 of the Complaint, and on that basis denies them.

20 55. Ferrero lacks knowledge and information regarding the allegations in paragraph
21 55 of the Complaint, and on that basis denies them.

22 56. Ferrero lacks knowledge and information regarding the allegations in paragraph
23 56 of the Complaint, and on that basis denies them.

24 57. Ferrero lacks knowledge and information regarding the allegations in paragraph
25 57 of the Complaint, and on that basis denies them.

26 58. Ferrero lacks knowledge and information regarding the allegations in paragraph
27 58 of the Complaint, and on that basis denies them.

1 59. Ferrero lacks knowledge and information regarding the allegations in paragraph
2 59 of the Complaint, and on that basis denies them.

3 60. Ferrero lacks knowledge and information regarding the allegations in paragraph
4 60 of the Complaint, and on that basis denies them.

5 61. Ferrero lacks knowledge and information regarding the allegations in paragraph
6 61 of the Complaint, and on that basis denies them.

7 62. Ferrero lacks knowledge and information regarding the allegations in paragraph
8 62 of the Complaint, and on that basis denies them.

9 63. Ferrero lacks knowledge and information regarding the allegations in paragraph
10 63 of the Complaint, and on that basis denies them.

11 64. Ferrero lacks knowledge and information regarding the allegations in paragraph
12 64 of the Complaint, and on that basis denies them.

13 65. Ferrero lacks knowledge and information regarding the allegations in paragraph
14 65 of the Complaint, and on that basis denies them.

15 66. Ferrero lacks knowledge and information regarding the allegations in paragraph
16 66 of the Complaint, and on that basis denies them.

17 67. Ferrero is informed and believes that the state of California, New York City,
18 Philadelphia, Baltimore, Stamford, Connecticut and Montgomery County, Maryland have
19 enacted certain measures relating to selling foods containing trans fats in food establishments.
20 Ferrero lacks knowledge and information regarding the remaining allegations in paragraph 67 of
21 the Complaint, and on that basis denies them.

22 68. Ferrero lacks knowledge and information regarding the allegations in paragraph
23 68 of the Complaint, and on that basis denies them.

24 69. Ferrero admits that by August 2008, Nutella® had been reformulated to be made
25 with palm oil, rather than peanut oil and partially hydrogenated peanut oil.

26 70. Ferrero denies the allegations in paragraph 70 of the Complaint.

27 71. Ferrero denies the allegations in paragraph 71 of the Complaint.

1 72. Ferrero lacks knowledge and information regarding the allegations in paragraph
2 72 of the Complaint, and on that basis denies them.

3 73. Ferrero lacks knowledge and information regarding the allegations in paragraph
4 73 of the Complaint, and on that basis denies them.

5 74. Ferrero admits Nutella contains soy lecithin. Ferrero denies the remaining
6 allegations in paragraph 74 of the Complaint.

7 75. Ferrero denies the allegations in paragraph 75 of the Complaint.

8 76. Ferrero denies the allegations in paragraph 76 of the Complaint.

9 77. Ferrero admits that Nutella® is labeled with the phrases “Hazelnut Spread,” “Start
10 your day with Nutella® spread. . .” and “An example of a tasty yet balanced breakfast: a glass of
11 skim milk, orange juice and Nutella® on whole wheat bread.” Ferrero admits that the label of
12 Nutella® depicts an example of this breakfast, showing fruit, a glass of orange juice, a glass of
13 milk, a slice of whole wheat bread covered in Nutella®, and a jar of Nutella®. Ferrero denies the
14 remaining allegations in paragraph 77 of the Complaint.

15 78. Ferrero admits that the Nutella® label includes a reference to a website, and that
16 this website includes the picture set forth in paragraph 78 of the Complaint. Ferrero denies the
17 remaining allegations in paragraph 78 of the Complaint.

18 79. Ferrero admits that the page titled “About Nutella®” on the Nutella website
19 contains the picture set forth in paragraph 79 of the Complaint and includes the language:
20 “contains quality ingredients such as skim milk and a hint of cocoa;” “Nutella® spread on whole
21 wheat bread, or any multigrain product, with orange juice or skim milk is a good combination for
22 a balanced breakfast that the entire family will enjoy;” and “contains no artificial colors or
23 preservatives.” Ferrero denies the remaining allegations in paragraph 79 of the Complaint.

24 80. Ferrero admits that the descriptions quoted in paragraph 80 of the Complaint can
25 be found on the Nutella® website using the links “hazelnut,” “skim milk,” and “cocoa.” Ferrero
26 denies the remaining allegations in paragraph 80 of the Complaint.

27 81. Ferrero admits that hazelnuts and cocoa are the third and fourth ingredients listed
28 for Nutella®, as defined by FDA regulations. Ferrero admits that Nutella® contains palm oil and

1 sugar in the amounts listed on its label, as defined by FDA regulations. Ferrero denies the
2 remaining allegations in paragraph 81 of the Complaint.

3 82. Ferrero admits that the portion of the Nutella® website titled “Nutella® and
4 Nutrition” cites to a 2005 study and provides information from Connie Evers, a registered
5 dietitian and children’s nutrition expert. Ferrero admits that paragraph 82 of the Complaint
6 contains partial quotes from the Nutella® website. Ferrero denies the remaining allegations in
7 paragraph 82 of the Complaint.

8 83. Ferrero denies the allegations in paragraph 83 of the Complaint.

9 84. Ferrero denies the allegations in paragraph 84 of the Complaint.

10 85. Ferrero admits that on the Nutella® website, Ms. Evers states, “a breakfast that
11 consists of a small whole grain bagel, with Nutella®, ½ cup of sliced strawberries and 1 cup of
12 1% milk is suitable for school-aged children.” Ferrero denies the remaining allegations in
13 paragraph 85 of the Complaint.

14 86. Ferrero admits that the Nutella® website contains the picture set forth in
15 paragraph 86 of the Complaint. Ferrero denies that paragraph 86 of the Complaint accurately
16 quotes Ms. Evers.

17 87. Ferrero admits that on the Nutella® website, Ms. Evers states, “The key to
18 enjoying Nutella® hazelnut spread at breakfast is an appropriate serving amount. For example,
19 just 1 tablespoon is a good amount for moms to serve to their children on a slice of whole grain
20 toast.” Ferrero admits that one tablespoon is one-half of a serving size of Nutella®, as
21 established by the FDA. Ferrero denies the remaining allegations in paragraph 87 of the
22 Complaint.

23 88. Ferrero admits that on the Nutella® website, Ms. Evers states that Nutella® “has a
24 nutritional profile that is comparable to other popular breakfast condiments, such as jellies and
25 syrup.” Ferrero denies the remaining allegations in paragraph 88 of the Complaint.

26 89. Ferrero denies the allegations in paragraph 89 of the Complaint.
27
28

1 90. Ferrero admits that it broadcasts television commercials portraying mothers
2 feeding Nutella® to children. These television commercials have been made available on the
3 Nutella® website. Ferrero denies the remaining allegations in paragraph 90 of the Complaint.

4 91. Ferrero admits that paragraph 91 of the Complaint accurately quotes the script
5 from a television commercial for Nutella®.

6 92. Ferrero admits that the paragraph 92 of the Complaint accurately quotes the script
7 from a television commercial for Nutella®.

8 93. Ferrero admits that the paragraph 93 of the Complaint accurately quotes the script
9 from a television commercial for Nutella®.

10 94. Ferrero admits that each of the three television commercials listed in paragraphs
11 91-93 of the Complaint depict Nutella® on toast, and contain text stating that Nutella® does not
12 have any artificial colors or preservatives. Ferrero denies the remaining allegations in paragraph
13 94 of the Complaint.

14 95. Ferrero admits that one television advertisement for Nutella® used the word
15 “wholesome,” and that two television advertisements for Nutella® used the word “simple.”
16 Ferrero denies the remaining allegations in paragraph 95 of the Complaint.

17 96. Ferrero denies the allegations in paragraph 96 of the Complaint.

18 97. Ferrero denies the allegations in paragraph 97 of the Complaint.

19 98. Ferrero denies the allegations in paragraph 98 of the Complaint.

20 99. Ferrero denies the allegations in paragraph 99 of the Complaint.

21 100. Ferrero denies the allegations in paragraph 100 of the Complaint.

22 101. Ferrero denies the allegations in paragraph 101 of the Complaint.

23 102. Ferrero denies the allegations in paragraph 102 of the Complaint.

24 103. Ferrero lacks knowledge and information as to the allegations regarding
25 plaintiffs and on that basis denies the allegations in paragraph 103 of the Complaint.

26 104. Ferrero lacks knowledge and information as to the allegations regarding
27 plaintiffs and on that basis denies the allegations in paragraph 104 of the Complaint.
28

1 105. Ferrero lacks knowledge and information as to the allegations regarding
2 plaintiff and on that basis denies the allegations in paragraph 105 of the Complaint.

3 106. Ferrero lacks knowledge and information as to the allegations regarding
4 plaintiff and on that basis denies the allegations in paragraph 106 of the Complaint.

5 107. Ferrero lacks knowledge and information as to the allegations regarding
6 plaintiffs and on that basis denies the allegations in paragraph 107 of the Complaint.

7 108. Ferrero denies the allegations in paragraph 108 of the Complaint.

8 109. Ferrero denies the allegations in paragraph 109 of the Complaint.

9 110. Ferrero denies the allegations in paragraph 110 of the Complaint.

10 111. Ferrero denies the allegations in paragraph 111 of the Complaint.

11 112. Ferrero denies the allegations in paragraph 112 of the Complaint.

12 113. Ferrero denies the allegations in paragraph 113 of the Complaint.

13 114. Ferrero denies the allegations in paragraph 114 of the Complaint.

14 115. Ferrero denies the allegations in paragraph 115 of the Complaint.

15 116. Ferrero denies the allegations in paragraph 116 of the Complaint.

16 117. Ferrero denies the allegations in paragraph 117 of the Complaint.

17 118. Ferrero denies the allegations in paragraph 118 of the Complaint.

18 119. Ferrero denies the allegations in paragraph 119 of the Complaint.

19 120. Ferrero denies the allegations in paragraph 120 of the Complaint.

20 121. Ferrero denies the allegations in paragraph 121 of the Complaint.

21 122. Ferrero denies the allegations in paragraph 122 of the Complaint.

22 123. Ferrero denies the allegations in paragraph 123 of the Complaint.

23 124. Ferrero admits that the purported classes, as defined by plaintiffs, would include
24 at least hundreds of thousands of individuals.

25 125. Ferrero denies the allegations in paragraph 125 of the Complaint.

26 126. Ferrero denies the allegations in paragraph 126 of the Complaint.

27 127. Ferrero denies the allegations in paragraph 127 of the Complaint.

28 128. Ferrero denies the allegations in paragraph 128 of the Complaint.

1 129. In answering paragraph 129 of the Complaint, Ferrero repeats and incorporates
2 its responses to paragraphs 1 through 128 as though set forth in full herein.

3 130. Ferrero admits the allegations in paragraph 130 of the Complaint.

4 131. Ferrero denies the allegations in paragraph 131 of the Complaint.

5 132. Ferrero denies the allegations in paragraph 132 of the Complaint.

6 133. Ferrero denies the allegations in paragraph 133 of the Complaint.

7 134. Ferrero denies the allegations in paragraph 134 of the Complaint.

8 135. Ferrero denies the allegations in paragraph 135 of the Complaint.

9 136. Ferrero denies the allegations in paragraph 136 of the Complaint.

10 137. Ferrero denies the allegations in paragraph 137 of the Complaint.

11 138. Ferrero admits that paragraph 138 of the Complaint purports to characterize
12 plaintiffs' prayer for relief. Ferrero denies that it conducted business through "unlawful, unfair,
13 and/or fraudulent acts." Ferrero denies that plaintiffs' claims have merit, and further denies that
14 plaintiffs are entitled to any form of relief.

15 139. Ferrero admits that paragraph 139 of the Complaint purports to characterize
16 plaintiffs' prayer for relief. Ferrero denies that it acquired any monies from the sale of Nutella®
17 "through the acts of unlawful, unfair, and/or fraudulent competition." Ferrero denies that
18 plaintiffs' claims have merit, and further denies that plaintiffs are entitled to any form of relief.

19 140. In answering paragraph 140 of the Complaint, Ferrero repeats and incorporates
20 its responses to paragraphs 1 through 139 as though set forth in full herein.

21 141. Ferrero admits the allegations in paragraph 141 of the Complaint.

22 142. Ferrero denies the allegations in paragraph 142 of the Complaint.

23 143. Ferrero denies the allegations in paragraph 143 of the Complaint.

24 144. Ferrero denies the allegations in paragraph 144 of the Complaint.

25 145. Ferrero denies the allegations in paragraph 145 of the Complaint.

26 146. Ferrero denies the allegations in paragraph 146 of the Complaint.

27 147. Ferrero denies the allegations in paragraph 147 of the Complaint.

1 148. Ferrero admits that paragraph 148 of the Complaint purports to characterize
2 plaintiffs' prayer for relief. Ferrero denies that it conducted business through "unlawful, unfair,
3 and/or fraudulent acts." Ferrero denies that plaintiffs' claims have merit, and further denies that
4 plaintiffs are entitled to any form of relief.

5 149. Ferrero admits that paragraph 149 of the Complaint purports to characterize
6 plaintiffs' prayer for relief. Ferrero denies that it acquired any monies from the sale of Nutella®
7 "through the acts of unlawful, unfair, and/or fraudulent competition." Ferrero denies that
8 plaintiffs' claims have merit, and further denies that plaintiffs are entitled to any form of relief.

9 150. In answering paragraph 150 of the Complaint, Ferrero repeats and incorporates
10 its responses to paragraphs 1 through 149 as though set forth in full herein.

11 151. Ferrero denies the allegations in paragraph 151 of the Complaint.

12 152. Ferrero denies the allegations in paragraph 152 of the Complaint.

13 153. Ferrero denies the allegations in paragraph 153 of the Complaint.

14 154. In answering paragraph 154 of the Complaint, Ferrero repeats and incorporates
15 its responses to paragraphs 1 through 153 as though set forth in full herein.

16 155. Ferrero admits the allegations in paragraph 155 of the Complaint.

17 156. Ferrero denies the allegations in paragraph 156 of the Complaint.

18 157. Ferrero denies the allegations in paragraph 157 of the Complaint.

19 158. Ferrero admits that plaintiffs provided Ferrero with a CLRA notice letter.

20 159. Ferrero admits that it elected not to provide refunds in response to plaintiffs'
21 CLRA notice, but denies that it participated in any of the wrongful conduct described therein.

22 160. Ferrero admits that paragraph 160 of the Complaint purports to characterize
23 plaintiffs' prayer for relief. Ferrero denies that plaintiffs' claims have merit, and further denies
24 that plaintiffs are entitled to any form of relief.

25 161. In answering paragraph 161 of the Complaint, Ferrero repeats and incorporates
26 its responses to paragraphs 1 through 160 as though set forth in full herein.

27 162. Ferrero denies the allegations in paragraph 162 of the Complaint.
28

1 163. Ferrero denies that plaintiffs or other consumers purchased Nutella from Ferrero
2 as alleged in paragraph 163 of the Complaint.

3 164. Ferrero denies the allegations in paragraph 164 of the Complaint.

4 165. Ferrero denies the allegations in paragraph 165 of the Complaint.

5 166. In answering paragraph 166 of the Complaint, Ferrero repeats and incorporates
6 its responses to paragraphs 1 through 165 as though set forth in full herein.

7 167. Ferrero denies the allegations in paragraph 167 of the Complaint.

8 168. Ferrero denies the allegations in paragraph 168 of the Complaint.

9 169. Ferrero denies the allegations in paragraph 169 of the Complaint.

10 170. Ferrero denies the allegations in paragraph 170 of the Complaint.

11 171. Ferrero denies the allegations in paragraph 171 of the Complaint.

12 172. Ferrero denies the allegations in paragraph 172 of the Complaint.

13 **AFFIRMATIVE DEFENSES**

14 Ferrero reserves the right to allege additional defenses as they become known, or
15 as they evolve during the litigation, and to amend its Answer accordingly.

16 **FIRST AFFIRMATIVE DEFENSE**

17 **(Statute of Limitations)**

18 Plaintiffs' claims are barred by the applicable statutes of limitations, including but
19 not limited to Cal. Civ. Code § 1783, Cal. Bus. & Prof. Code. § 17208, Cal. Civ. Code § 338(a).

20 **SECOND AFFIRMATIVE DEFENSE**

21 **(Federal Preemption)**

22 Plaintiffs' claims are expressly and impliedly preempted by federal law, including
23 but not limited to, the Food, Drug and Cosmetic Act, the Nutrition Labeling and Education Act
24 of 1990, and the Federal Drug Administration's regulations.

25 **THIRD AFFIRMATIVE DEFENSE**

26 **(Unjust Enrichment)**

27 Plaintiffs' claims are barred to the extent plaintiffs would be unjustly enriched if
28 allowed to recover any monies claimed to be due in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

(Offset of Damages)

Ferrero is entitled to offset damages, if any, by benefits received by plaintiffs and persons allegedly represented.

FIFTH AFFIRMATIVE DEFENSE

(Election of Remedies)

Plaintiffs and persons allegedly represented seek mutually inconsistent remedies, resulting in prejudice to Ferrero.

SIXTH AFFIRMATIVE DEFENSE

(Ratification)

Plaintiffs and persons allegedly represented have enjoyed the benefits of their purchase of the product which is the subject of the Complaint and are thereby barred from making the claims for relief set forth in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver/Estoppel)

Plaintiffs and/or persons allegedly represented have waived and/or are estopped from asserting each purported cause of action in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

(Justifiable Actions)

Any conduct undertaken by Ferrero concerning or relating to plaintiffs and/or persons allegedly represented was in all respects fair, privileged, or justified and was undertaken without malice, unlawful means, or intent to injure plaintiffs or any other person or entity.

NINTH AFFIRMATIVE DEFENSE

(Laches)

Plaintiffs' Complaint and each cause of action asserted therein, is barred by the doctrine of laches by reason of plaintiffs' conduct, actions and/or omissions.

TENTH AFFIRMATIVE DEFENSE

(Safe Harbor)

Plaintiffs' claims are barred by California's safe harbor doctrine because Ferrero's alleged actions, at all relevant times and places, were in compliance with applicable law.

ELEVENTH AFFIRMATIVE DEFENSE

(Reservation)

Further responding, Ferrero states that it currently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses available. Ferrero reserves the right to assert additional affirmative defenses in the event that discovery indicates it would be appropriate.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Ferrero demands a trial by jury of all triable issues and affirmative defenses herein.

Dated: September 12, 2011

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Keith E. Eggleton
Keith E. Eggleton

Attorneys for Defendant Ferrero U.S.A., Inc.